

SENATE BILL REPORT

EHB 2070

As Reported By Senate Committee On:
Judiciary, March 30, 2007

Title: An act relating to exceptional sentences.

Brief Description: Concerning exceptional sentences.

Sponsors: Representatives O'Brien, Goodman and Pearson.

Brief History: Passed House: 3/08/07, 96-0.

Committee Activity: Judiciary: 3/23/07, 3/30/07 [DPA].

SENATE COMMITTEE ON JUDICIARY

Majority Report: Do pass as amended.

Signed by Senators Kline, Chair; Tom, Vice Chair; McCaslin, Ranking Minority Member; Carrell, Hargrove, Murray, Roach and Weinstein.

Staff: Lidia Mori (786-7755)

Background: The 2004 U.S. Supreme Court case of *Blakely v Washington* held that a criminal defendant has a Sixth Amendment right to have a jury determine any aggravating fact, other than the fact of a prior conviction, that is used to impose greater punishment than the standard sentencing range. In 2005, the Washington State Legislature passed legislation that was intended to bring the state sentencing reform act into accord with the decision in *Blakely*. Under the new procedure created by the legislation, at any time prior to trial or entry of a guilty plea, if substantial rights of the defendant are not prejudiced, the state may give notice that it is seeking a sentence above the standard sentencing range and the notice must state the aggravating circumstances upon which the requested sentence will be based. The facts supporting aggravating circumstances must be proved to a jury beyond a reasonable doubt.

In *State v. Hughes*, the Washington State Supreme Court held that there is no inherent authority to empanel a jury to determine whether an exceptional sentence should be imposed. The court emphasized that it has consistently held that the fixing of legal punishments for criminal offenses is a legislative function.

In the recent case of *Pillatos*, the Washington State Supreme Court ruled that changes the Legislature made in 2005 in response to the *Blakely* decision do not apply to cases where trials have already begun or guilty pleas have already been entered. This would include cases that have been remanded for resentencing because of the *Blakely* decision.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Summary of Engrossed Bill: In any case where a new trial or new sentencing hearing is required, the superior court has the authority to impanel a jury to consider any aggravating circumstances, as alleged by the state and listed in statute, at either the new trial or, if no new trial is necessary, at the new sentencing hearing.

EFFECT OF CHANGES MADE BY RECOMMENDED AMENDMENT(S) AS PASSED COMMITTEE (Judiciary): When a new sentencing hearing is required in a case where an exceptional sentence was imposed, the superior court may impanel a jury to consider any alleged aggravating circumstances listed in RCW 9.94A.535(3) that were relied upon by the superior court in imposing the previous sentence.

Appropriation: None.

Fiscal Note: Available.

Committee/Commission/Task Force Created: No.

Effective Date: This bill contains an emergency clause and takes effect immediately.

Staff Summary of Public Testimony: PRO: If a judge imposes a more severe sentence on remand of a case, vindictiveness is presumed. It is a rare circumstance that a judge would do so. The sentencing reform act is silent on this subject.

CON: Allowing a court to consider an aggravating circumstance that was not considered at the first trial could have a chilling effect on a person's right to appeal. The vindictiveness presumption wouldn't keep a prosecutor from trying to get a new circumstance considered and just that effort could convince someone not to appeal what could be a good case.

Persons Testifying: PRO: Representative O'Brien, prime sponsor; Jim Whisman, King County Prosecuting Attorney's Office, Washington Association of Prosecuting Attorneys.

CON: John Sinclair, Washington Association of Criminal Defense Lawyers.